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"Wrongful Living": Recovery for a Physicians's Infringement on an Individual's Right to Die

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COMMENTS

"WRONGFUL LIVING": RECOVERY FOR A PHYSICIAN'S INFRINGEMENT ON AN INDIVIDUAL'S RIGHT TO DIE

I. INTRODUCTION

In 1990, the United States Supreme Court, in *Cruzan v. Director, Missouri Department of Health*, recognized a constitutionally protected liberty interest under the due process clause in a person's refusal of unwanted lifesaving medical treatment.[1] The Court viewed this right as the logical outgrowth of the common law doctrine of informed consent which provides that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[2] The recognition of this constitutional right to refuse lifesaving medical treatment has led to

1. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990). Citing the Fourteenth Amendment of the United States Constitution which provides that no State shall "deprive any person of life, liberty, or property, without due process of law," the Supreme Court held that a competent person has a liberty interest in refusing unwanted lifesaving medical treatment. *Id.* at 278. The Court recognized the need to balance an individual's liberty interests with state interests of the "protection and preservation of human life" *Id.* at 280. To establish this balance, the Court recognized the state of Missouri's standard of proof requiring "clear and convincing" evidence of an individual's desire to refuse treatment. *Id.* at 284. The right to refuse unwanted lifesaving medical treatment as recognized in *Cruzan* was affirmed again recently by the United States Supreme Court in *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997).

2. *Cruzan*, 497 U.S. at 269 (quoting Justice Cardozo of the Court of Appeals of New York in Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914)). The Court expands the common-law doctrine to include the right to refuse lifesaving treatment reasoning that "[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." *Id.* at 270. Other courts have grounded a right to refuse treatment in a constitutional right to privacy. *See* In re Quinlan, 355 A.2d 922 (N.J.), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 647 (1976). The New Jersey Supreme Court held that Karen Quinlan had a right of privacy, grounded in the Federal Constitution, to terminate treatment. *Id.* at 662-64. Traditionally, courts have based a right to refuse medical treatment either solely on the common-law right to informed consent or both on the common-law right and a constitutional privacy right. *Cruzan*, 497 U.S. at 271-77.

both federal and state legislation designed to preserve that right and to provide the practical means and protocols for its enforcement.[3] But while *Cruzan* confirmed the existence of the right to refuse medical treatment, or the "right to die"[4] as it is often called, and federal and state legislation has given it some practical effect,[5] a corresponding ability to recover damages caused by the infringement of this liberty has not gained general acceptance in the American legal community.[6]

"Wrongful living" is a relatively new cause of action that seeks to redress a medical professional's intentional or negligent interference with an individual's right to refuse medical treatment.[7] The rationale for the wrongful living cause of action is that medical professionals who administer unwanted resuscitation or maintain unwanted life support systems in direct violation of the patient's express wishes should be liable to that patient in some fashion for the unwanted prolongation of life.[8] Despite

3. *See* discussion of the Patient's Self Determination Act and related state statutes *infra* notes 25-33.

4. 1 ALAN MEISEL, THE RIGHT TO DIE 4 (2d ed. 1995). This Comment limits the application of the term "right to die" to the discussion of the constitutional right to refuse medical treatment established in *Cruzan*. It will not explore the existence or non-existence of a constitutionally protected right to determine the time and manner of one's own death as recently discussed in the Supreme Court decision in *Washington v. Glucksburg*, 117 S. Ct. 2258 (1997). In that case, the Court held that the right to assistance in committing suicide was not a fundamental liberty interest protected by the due process clause. *Id.* at 2271.

5. *See infra* notes 25-27.

6. Tricia Jonas Hackelman, *Violation of an Individual's Right to Die: The Need for a Wrongful Living Cause of Action*, 64 U. CIN. L. REV. 1355, 1381 (1996). "[P]hysicians and health care providers are immune from legal sanctions, or are given only mild sanctions, for failing to abide by a patient's" refusal of medical treatment. *Id. See* M. Rose Gasner, *Financial Penalties for Failing to Honor Patient Wishes to Refuse Treatment*, 11 ST. LOUIS U. PUB. L. REV. 499 (1992). "[T]o date, there has been no significant, final monetary award to a patient or an estate" for the infringement on the right to refuse treatment. *Id. See* Anderson v. St. Francis-St. George Hosp., 614 N.E.2d 841, 846 (Ohio Ct. App. 1992) ("*Anderson I*"), *appeal after remand*, 1995 WL 109128 (Ohio Ct. App. Mar. 15, 1995) ("*Anderson II*"), *rev'd*, 671 N.E.2d 225 (Ohio 1996). The appellate court held that "life is not a compensable harm." *Id. See also* Flanagan v. Williams, 623 N.E.2d 185, 191 (Ohio Ct. App. 1993) holding that "we are not prepared to say that life, even with severe disabilities, constitutes an actionable injury." *Id.*

7. *See generally* A. Samuel Oddi, *The Tort of Interference with the Right to Die: The Wrongful Living Cause of Action*, 75 GEO. L. J. 625 (1986); William C. Knapp & Fred Hamilton, *"Wrongful Living" : Resuscitation as a Tortious Interference with a Patient's Right to Give Informed Refusal*, 19 N. KY. L. REV. 253, 260-62 (1992); Hackelman, *supra* note 6; Adam A. Milani, *Better off Dead than Disabled?: Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patient's Advanced Directives*, 54 WASH. & LEE L. REV. 149 (1997).

8. Anderson v. St. Francis-St. George Hosp., 671 N.E.2d 225, 227 (Ohio 1996). The

recognition of a constitutional right to refuse lifesaving medical treatment, a cause of action for violation of this right has received virtually no support in the American legal system.[9] The problem appears to be that courts are reluctant to recognize prolonging life as a cognizable injury entitling the plaintiff to damages.[10]

While courts have refused to recognize the relatively new wrongful living cause of action, courts and legal theorists assert that patients receiving unwanted medical care may still sue for damages in tort based primarily in battery or negligence principles.[11] Under these tort actions, the inter-

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Ohio Supreme Court explains the purpose of the wrongful living cause of action, stating that "the event or loss for which the plaintiff seeks damages is neither death nor life, but *the prolongation of life*." *Id.* *See* Knapp & Hamilton, *supra* note 7, at 258. "[T]he wrongful living plaintiff asserts the highly personal right to decide what medical treatment he or she will choose to accept, even if the choice to forego that treatment will almost certainly result in the individuals *own* death." *See* Hackelman, *supra* note 6, at 1358. "[A] cause of action is needed to maintain the meaning of the right to refuse treatment. The wrongful living claim can ensure that physicians and health care providers do not substitute their personal values for those of their patients by awarding damages to the patients." *Id.* *See* Oddi, *supra* note 7, at 665. The wrongful living cause of action "fully recognizes a person's right to die and provides compensation for the loss suffered by that person for interference with it, namely, the prolongation of life." *Id.*

9. *Anderson*, 671 N.E.2d at 228. The Court concluded that "there is no cause of action for 'wrongful living.'" *Id.* *See also* Benoy v. Simons, 831 P.2d 167, 170 (Wash. Ct. App. 1992) denying a cause of action for wrongful prolongation of life.

10. *See* Anderson v. St. Francis-St. George Hosp., No. C-930819 1995 WL 109128 at *3(Ohio App. 1 Dist. 1995). "It is the law of the case that Winter cannot recover damages for wrongful living. By that we mean that he cannot recover general damages just for finding himself alive after unwanted resuscitative measures." *Id.* *See also* Greco v. United States, 893 P.2d 345, 348 (Nev. 1995). Recognizing life as an injury would be adverse to the "very nearly uniform high value which the law and mankind has placed on human life, rather than its absence." *Id.* *See also* Flanagan v. Williams 623 N.E.2d 185, 191 (Ohio Ct. App. 1993). "We are not prepared to say that life . . . constitutes an actionable injury." *Id.* *See also* Milani, *supra* note 7, at 221. Arguing against a cause of action for wrongful living Milani explains that such a suit requires the court to "decide if [life's] worth is so minimal that the person would be better off dead and is entitled to compensation for living." *Id.* Milani claims the judiciary is not equipped to make this decision and has "no business declaring that among the living are people who are better off dead." *Id.*

11. *See* Willard H. Pedrick, *Dignified Death and the Law of Torts*, 28 SAN DIEGO L. REV. 387, 396 (1991).

> [W]hen health care givers subject a competent patient to life sustaining procedures against his or her will, the settled law of torts provides a remedy by way of an action for battery, with resultant liability on the part of the health care givers for substantial damages, both general and punitive.

Id. *See Anderson II*, No. C-930819 1995 WL 109128 at *3 (Ohio App. 1 Dist 1995). "If . . . the fact finders determine that negligence or battery occurred . . . the estate may legally recover damages caused by the unwanted resuscitative efforts and express violation of his wishes." *Id.* *See* Estate of Leach v. Shapiro, 469 N.E.2d 1047, 1051 (Ohio Ct. App. 1984). Holding that "a patient may recover for battery if his refusal [of medical treatment] is

ference with the right to refuse medical treatment, whether it be performed intentionally or negligently, theoretically gives rise to a claim for damages that are proximately caused by the interference.[12]

Although the law entitles patients to bring tort claims for unwanted lifesaving treatment, patients and estates bringing such suits have encountered significant difficulty in realizing damages for these claims.[13] In fact, it was the extreme reluctance of our legal system to recognize damages under traditional tort claims that prompted the development of the wrongful living cause of action.[14] A significant factor influencing the refusal to recognize damages in these tort suits has been the determination that any injury associated with unwanted lifesaving medical treatment is inextricably bound to the injury of prolonging life, and is thus not cognizable.[15] The universal refusal to recognize prolonged life as an injury deserving damages[16] and the difficulty of succeeding in traditional tort suits have frustrated plaintiffs who seek to prove a legitimate causal connection between the unwanted treatment in question and the damages they seek.[17]

This Comment explores why the judicial system in this country has categorically resisted allowing recovery for the violation of an individual's constitutionally protected liberty interest in refusing lifesaving medical treatment. It examines the legal principles that shape the debate over whether to permit recovery, as well as discusses some alternative solutions, which may reduce the current inconsistency in recognizing a constitutionally protected right without providing recovery for its infringement.

The Comment is divided into six sections. The first section explores

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ignored." *Id.* *See* Steven I. Addelstone, *Liability for Improper Maintenance of Life Support: Balancing Patient and Physician Autonomy*, 46 VAND. L. REV. 1255, 1267-73 (1993). A patient or his estate can seek recovery in suits based in battery, negligence, breach of contract and constitutional actions under 42 U.S.C. § 1983.

12. *Anderson II*, No. C-930819 1995 WL 109128 at *3. The appellate court held that a patient was entitled to all damages proximately caused by the administration of unwanted lifesaving medical procedures. *See* discussion of causation in fact and proximate cause *infra* notes 54-55.

13. *See* 2 MEISEL, THE RIGHT TO DIE 401 (2d ed. 1995).

14. *Id.*

15. *See Anderson*, 671 N.E.2d at 228-29 discussed *infra* in text accompanying notes 66-104.

16. *See* Anderson v. St. Francis-St. George Hosp., 614 N.E.2d 841, 846 (Ohio Ct. App. 1992). "Appellant's attempt to create a wrongful living cause of action fails because life is not a compensable harm." *Id.* *See also Anderson*, 671 N.E.2d at 228 (Ohio 1996); Benoy v. Simons, 831 P.2d 167, 170 (Wash. Ct. App. 1992); Flanagan v. Williams, 623 N.E.2d 185, 191 (Ohio Ct. App. 1993).

17. *See Anderson*, 671 N.E.2d 225 (Ohio 1996). *See also* Gasner, *supra* note 6, at 499.

the right to refuse medical treatment as it was confirmed in *Cruzan*, and examines the legislation which has developed to enable patients to exercise this right to die. The second section examines the elements, justifications for and criticisms of the wrongful living cause of action. It also presents the tort claims that remain available to patients and their estates for the infringement of one's right to die. The third section present's *Anderson v. St. Francis-St. George Hospital*,[18] a recent case involving a claim for infringement of the right to refuse treatment following an unwanted resuscitation. A discussion of this case demonstrates the difficulties plaintiffs encounter in bringing claims for either wrongful living or more traditional tort causes of action. The fourth section analyzes the *Anderson* case to highlight the roadblocks that have prevented individuals from recovering for an infringement of their right to die. The fifth section explores some solutions which address these traditional barriers. The final section provides a commentary on the frustration that right to die plaintiffs have encountered and will continue to encounter under the current state of the law.

II. The Right to Die and Legislation Giving it Effect

A. The Right to Refuse Medical Treatment

The United States Supreme Court recognized that competent individuals possess a constitutional right to refuse lifesaving medical treatment in *Cruzan*.[19] At the foundation of the Court's recognition of this right are the fundamental principles of bodily integrity and the common law legal

18. *See Anderson I*, 614 N.E.2d 841, appeal after remand, No. C-930819 1995 WL 109128 (Ohio Ct. App. Mar. 15, 1995), *rev'd*, 671 N.E.2d 225.

19. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990). Competent individuals have the right to refuse medical treatment pursuant to the 14th Amendment Due Process Clause. "[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id. See also* George J. Annas, *The "Right to Die" in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, 34 Duq. L. Rev. 875, 876 (1996). "If you're competent you have a right to refuse any treatment, for any reason." *Id. See also Cruzan*, 497 U.S. at 279-82. Where the competency of a decision to refuse treatment is called into question, *Cruzan* requires that a patient's liberty interest be balanced against a state's interest in the preservation of human life. *Id.* at 279. In achieving this balance, the Court supports a state's right to require "clear and convincing" evidence to establish proof of a patient's desire to refuse lifesaving treatment. *Id.* at 281-82. "The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." *Id.* at 281.

doctrine of informed consent.[20] The doctrine of informed consent provides that "[a] physician who treats a patient without consent commits a battery, even though the procedure is harmless or beneficial."[21] The Supreme Court determined that the logical corollary of the doctrine of informed consent was that a patient generally possesses the right not to consent.[22] This right not to consent, in turn, was held to encompass the right of competent individuals to refuse lifesaving medical treatment, or in more colloquial language, "the right to die."[23]

B. Legislating the Right to Die

Following the Court's decision recognizing an individual's right to refuse medical treatment, a concerted effort by both federal and state legislatures began to give it practical effect.[24] Currently, on the federal level, the Patient Self Determination Act[25] requires medical institutions to provide patients with information concerning their right to make decisions in connection with medical care, including the right to accept or refuse medical or surgical treatment, and the right to formulate advanced directives, documents establishing what medical treatment an individual will or will not undergo.[26] On the state level, "natural death" or "living will" legisla-

20. *Cruzan*, 497 U.S. at 269. "[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person. . . ." *Id.* (quoting Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)). The principle of bodily integrity has led to the requirement that informed consent be present before the administering of medical treatment. *Id.* "The informed consent doctrine has become firmly entrenched in American tort law." *Id.* at 269. The court also recognized that some courts have found a right to refuse lifesaving treatment based on the constitutional right to privacy. *Id.* at 270 (citing In re Quinlan, 355 A.2d 647 (N.J.), *cert denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976)). For other cases basing a right to refuse treatment on the constitutional right to privacy *see* Rasmussen v. Flemming, 741 P.2d 674, 681-682 (Ariz. 1987); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301(Cal. Ct. App. 1986); Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Cal. Ct. App. 1984).

21. Estate of Leach v. Shapiro, 469 N.E.2d 1047, 1051 (Ohio Ct. App. 1984).

22. *Cruzan*, 497 U.S. at 270. "The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." *Id.*

23. *Id.* at 279.

24. *See* Milani, *supra* note 7, at 158-60. *See also* Jon L. Spargur, Jr., *First Healthcare Corp. v. Rettinger: Are Living Wills Dead in North Carolina?*, 32 WAKE FOREST L. REV. 591, 592 (1997). "In the last two decades, numerous states have enacted legislation to protect individuals' decisionmaking rights when the end of life draws near." *Id.*

25. Patient Self Determination Act, 42 U.S.C. 1395cc(f)(1993).

26. *See Id. See also* David B. Clarke, *The Patient Self-Determination Act, in* HEALTH CARE ETHICS: CRITICAL ISSUES at 93-94 (John F. Monagle & David C. Thomasma eds. 1994). "Advance directive is the general term for a variety of documents designed to enable competent adults to make health care decision-making plans in advance of future

tion has been enacted by nearly all states enabling individuals to dictate for themselves the withdrawal of medical assistance upon diagnosis of a terminal condition.[27]

Both the Patient Self Determination Act and a majority of state statutes give effect to advanced directives formulated by individual pa-

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incapacity, including terminal illness." *Id.* The Patient Self Determination Act requires Medicare and Medicaid institutional providers to: 1) provide written information to patients about the person's right to accept or refuse medical treatment and the right to complete advanced directives; 2) indicate in the patient's records whether or not he or she has established an advanced directive, 3) ensure compliance with state laws concerning advanced directives; and 4) provide education for the institutional staff on issues concerning advanced directives. *Id.* at 93. Additionally, "each state . . . must develop a written description of the law of the state . . . concerning advanced directives and distribute the document to local health care providers. . . ." *Id.* at 94.

27. Milani, *supra* note 7, at 159 (footnote ommitted). "Almost every state has now adopted a living will statute that permits competent adults to execute advance directives stating that they do not wish to be kept alive by medical treatment in the latter stages of terminal illness or if they become permanently or irreversibly unconscious." *Id.* The state statutes currently legislating the right to refuse medical treatment include the following: ALA. CODE §§ 22-8A-1 to -10 (1990 & Supp. 1996); ALASKA STAT. §§ 18.12.010-.100 (Michie 1994); ARK. CODE ANN. §§ 20-17-201 to -218 (Michie 1991 & Supp. 1995); CAL. HEALTH & SAFETY CODE §§ 7185-7194.5 (West Supp. 1996); COLO. REV. STAT. §§ 15-18-101 to -113 (Supp. 1986); CONN. GEN. STAT. ANN. §§ 19a-570 to -580c (West Supp. 1996); DEL. CODE ANN. TIT. 16, §§ 2501-2508 (1995); D.C. CODE ANN. §§ 6-2421 to -2430 (1995); FLA. STAT. ANN. §§ 765.101-.401 (West Supp. 1996); GA. CODE ANN. §§ 31-32-1 to -12 (1996); HAW. REV. STAT. ANN. §§ 327D-1 to -27 (Michie Supp. 1992); 755 ILL. COMP. STAT. ANN. §§ 35/1-10 (West 1992 & Supp. 1996); IND. CODE ANN. §§ 16-36-4-1 to -21 (Michie 1993 & Supp. 1996); IOWA CODE ANN. §§ 144A.1-.12 (West 1989 & Supp. 1996); KAN. STAT. ANN. §§ 65-28, 101-109 (1992 & Supp. 1995); KY. REV. STAT. ANN. §§ 311.621-.643 (Michie 1995); LA. REV. STAT. ANN. §§ 40:1299.58.1-.10 (West 1992 & Supp. 1996); ME. REV. STAT. ANN. TIT. 18A, §§ 5-801 to -817 (West Supp. 1995); MD. CODE ANN. HEALTH-GEN. I. §§ 5-601 to -618 (1994 & Supp. 1996); MINN. STAT. ANN. §§ 145B.01-.17 (West Supp. 1996); MISS. CODE ANN. §§ 4141-101 to -121 (1993); MO. ANN. STAT. §§ 459.010-.055 (West 1992 & Supp. 1996); MONT. CODE ANN. §§ 50-9-101 to -206 (1995); NEB. REV. STAT. §§ 20-401 to -416 (Supp. 1994); NEV. REV. STAT. §§ 449.535-.690 (1995); N.H. REV. STAT. ANN. §§ 137-H:1 to 16 (1996); N.J. STAT. ANN. §§ 26:2H-53 to -78 (West 1996); N.M. STAT. ANN. §§ 24-7-1 to -11 (Michie 1994 & Supp. 1995); N. D. CENT. CODE §§ 23-06.4-01 to -14 (1991 & Supp. 1995); OHIO REV. CODE ANN. §§ 2133.01-.15 (West 1994 & Supp. 1995); OKLA. STAT. ANN. TIT. 63, §§ 3101.1-.16 (West Supp. 1996); OR. REV. STAT. §§ 127.505-.660 (1993); 20 PA. CONS. STAT. ANN. §§ 5401-5416 (West Supp. 1996); R.I. GEN. LAWS §§ 234.11-1 to -14 (Supp. 1995); S.C. CODE ANN. §§ 44-77-10 to -160 (Law. Co-op supp. 1995); TENN. CODE ANN. §§ 32-11-101 to -112 (Supp. 1996); TEX. HEALTH & SAFETY CODE ANN. §§ 672.001-.021 (West 1992 & Supp. 1996);UTAH CODE ANN. §§ 75-2-11-1 to -1119 (1993 & Supp. 1996); VT. STAT. ANN. TIT. 18, §§ 5251-5262 (1987); VA. CODE ANN. §§ 54.1-2981 to -2993 (Michie 1994); WASH REV. CODE ANN. §§ 70.122.010-.920 (West 1992 & Supp. 1996); W. VA. CODE §§ 16-30-1 to -13 (1995); WIS. STAT. ANN. §§ 154.01-.15 (West 1989 & Supp. 1995); WYO. STAT. ANN. §§ 35-22-101 to -208 (Michie 1994).

tients.[28] An advanced directive is the means by which competent adults may plan for a medical decision at some time in the future when they might no longer possess decision-making capacity.[29] Generally, there are three types of advanced directives: living wills, proxy directives and combination directives.[30] A living will is a document which gives instructions to health care providers about particular treatments that an individual would or would not approve of in efforts to prolong his or her life.[31] Proxy directives, also known as durable powers of attorney, permit an individual to appoint someone to make medical decisions for them in the event that he or she is incompetent to do so for themselves.[32] A combination directive forges into a single instrument the ability to appoint an individual to make treatment decisions with the proxy instructions concerning the patient's wishes regarding refusal of certain treatments.[33]

Building on the United States Supreme Court's recognition of a constitutional right to refuse lifesaving treatment, the United States Congress and a majority of state legislatures have taken these proactive steps to protect patients from the infringement of this right. But while this kind of legislation has had a significant impact on the awareness as well as the protection of this right, the right to die has not received judicial support.

III. The Wrongful Living Cause of Action & Tort Actions Seeking Relief for the Infringement on the Right to Die

A. Wrongful Living

A claim for wrongful living exists where a patient or his estate is seek-

28. *See supra* notes 25-27.

29. 2 Meisel, *supra* note 13, at 5-6. In addition to giving legislative effect to the right to refuse medical treatment as established in *Cruzan*, advanced directives serve three purposes. The first enables an individual to exercise some degree of control over refusing medical care if he or she lacks the capacity to make decisions at the time they need to be made. Second, advance directives eliminate the need to turn to the legal system to ascertain whether to discontinue life-saving treatment. By establishing express wishes regarding treatment in writing, court battles regarding an individual's "clear and convincing" desire to refuse medical treatment become unnecessary. Finally, advance directives provide immunity from liability for the health care providers who respect the wishes of the patient in the refusal of treatment.

30. *Id.* at 6.

31. *Id. See also* Clarke, *supra* note 26, at 94-95. Living wills are "written statements . . . signed by a competent adult, witnessed and perhaps notarized, that affirm that, in the event of terminal illness the person wishes to forgo treatment that would serve only to prolong the dying process and would not effect a cure or recovery." *Id.*

32. 2 Meisel, *supra* note 13, at 6.

33. *Id.*

ing a remedy for the injury of continued living resulting from an unwanted administration of lifesaving medical treatment in violation of that individual's express wishes asserting the right to die.[34] To understand why courts have rejected wrongful living as a cause of action,[35] it is helpful to examine all of its elements.

In actuality, wrongful living is a damages concept, and like a claim for "wrongful whiplash" or a "wrongful broken arm," it is an action which necessarily involves an underlying claim of negligence or battery.[36] Where a wrongful living claim involves an underlying claim of battery, the plaintiff must prove that there was an intentional, unconsented to touching which caused injuries warranting damages.[37] Where a wrongful living suit is based on a claim of negligence, the plaintiff must prove that there was a duty, that there was a breach of that duty, and that said breach caused the plaintiff an injury deserving of damages.[38]

Given that *Cruzan* establishes a liberty interest in the right to refuse medical treatment, proving the unconsented to touching required in an underlying claim of battery is relatively easy so long as a medical professional, who is actually aware of the patient's refusal, proceeds to render lifesaving treatment in spite of said refusal.[39] Similarly, the duty and breach requirements in a suit founded on negligence present few obstacles.[40] The plaintiff need simply "postulate a breach of duty owed by medical providers to be aware of and honor the patient's previously expressed desire to forego potentially lifesaving treatment."[41]

When a plaintiff seeks damages for prolonging life, in theory, few obstacles exist to establish the element of causation. "Once it is established

34. *Anderson*, 671 N.E.2d at 227. "The patient asserts a right to enforce an informed, competent decision to reject life-saving treatment." *Id. See* Oddi, *supra* note 7, at 641. "If the interfering treatment is made and the patient lives, then interference with the right to die involves compensation for living . . . .[T]his is the 'wrongful living' cause of action." *Id.*

35. *See Anderson I*, 614 N.E.2d at 846. "Appellant's attempt to create a wrongful living cause of action fails . . . .[O]ur role is not to create causes of action." *Id. See also Anderson II*, No. C-930819 1995 WL 109128 at *2 (Ohio Ct. App.). "Ohio does not recognize such an action." *Id. See also Anderson*, 671 N.E.2d at 228 (confirming that no claim for wrongful living exists in Ohio); Benoy v. Simons, 831 P.2d 167, 170 (Wash. Ct. App. 1993) (rejecting a cause of action for wrongful prolongation of life).

36. *See* Knapp & Hamilton, *supra* note 7, at 261.

37. *Anderson*, 671 N.E.2d at 227. *See also* W. PAGE KEETON ET. AL, PROSSER & KEETON ON THE LAW OF TORTS 39-42 (5th ed. 1984)(for a discussion of battery generally).

38. *Anderson*, 671 N.E.2d at 227. *See also* W. PAGE KEETON ET. AL, *supra* note 37, at 164-68 (for a discussion of negligence generally).

39. *Id.*

40. Gasner, *supra* note 6, at 499.

41. Knapp & Hamilton, *supra* note 7, at 261

that but for the conduct of the medical professional, death would have resulted, the causation element of a 'wrongful living' [claim] is satisfied."[42] So if a court were to accept prolongation of life as an injury, the causation requirement would be satisfied so long as the patient experienced prolonged life.

The real difficulty plaintiffs encounter in wrongful living suits lies in convincing courts that the prolonging of an individual's life is an injury meriting damages.[43] In attempting to quantify the damages that result from prolonged life, courts have traditionally, and understandably, been unwilling to measure the comparative value of being versus non-being.[44] Thus even though an unconsented to touching or breach of duty may have been established, courts have refused to recognize the wrongful living cause of action because of their extreme discomfort with visualizing the injury being claimed, life, as an injury at all.[45]

B. Traditional Tort Claims in Negligence and Battery

While courts have refused to accept claims for wrongful living because they are ill at ease finding a cognizable injury in continued living, they do not prohibit claims brought directly under battery and negligence.[46] The

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42. *Anderson*, 671 N.E.2d at 227.

43. *See* Knapp & Hamilton, *supra* note 7, at 266. "By far the most difficult element of a 'wrongful living' claim is the concept of continued life as a compensable injury." *Id.*

44. *Id.* at 266. "[C]ourts have consistently held, either as a matter of policy or of proof, that they are unable to calculate the value of life as contrasted to the value of 'non-life.'" *Id. See also* Procanik v. Cillo, 478 A.2d 755 (N.J. 1984). "The crux of the problem is that there is no rational way to measure non-existence or to compare non-existence with the pain and suffering of existence .... Although damages ... need not be calculated with mathematical precision, they require at their base some modicum of rationality." *Id.* at 763.

45. *See* Greco v. United States, 893 P.2d 345, 248 (Nev. 1995)(quoting Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978)). Recognizing life as an injury would be adverse to the "very nearly uniform high value which the law and mankind has placed on human life, rather than its absence." *Id. See also* Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 697 (Ill. 1987) (quoting Becker, 386 N.E.2d at 812, stating that the comparison of life versus non-life is a "comparison the law is not equipped to handle.").

46. Oddi, *supra* note 7, at 636.

> If the treatment was intentional and with knowledge that the person asserting the right to die had withheld consent, the tort of battery ... obviously lie[s]. Absent an intent to override the patient's wishes, there is also the possibility that one could negligently breach a duty not to treat where the party providing the treatment *should have known* of the patient's refusal to be treated.

Id. (emphasis added). *See also* Willard H. Pedrick, *Arizona Tort Law and Dignified Death*, 22 ARIZ. ST. L.J. 63, 78 (1990). "The health-care giver who subjects the patient to life-sustaining procedures against contrary instructions ... is subject to liability for assault and battery." *Id. See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990)(explaining

legal theory supporting these suits is identical to that described above where battery or negligence serves as the underlying cause of action for a suit in wrongful living. The plaintiff alleges that a medical professional either intentionally[47] or negligently[48] administered lifesaving treatment against his express wishes and without his consent. Unlike wrongful living, the injuries claimed in battery or negligence tort actions are not focused directly on the prolonging of life, rather, the concern is on injury to the person proximately caused by the administering of unwanted medical treatment.[49]

Under traditional tort law, "one injured by the tort of another is entitled to recover damages from the other for all harm, past, present, and prospective, legally caused by the tort."[50] In any tort action the primary elements are *injury*, *harm* and *damages*.[51] Traditionally, these elements have been defined as follows: "*injury* refers to the invasion of a legally protected interest; *harm*, to the loss or detriment suffered by the victim of such an invasion; and *damages*, to the money that may be recovered by the victim from the person legally responsible for the injury."[52] For courts to award damages in a tort action a cognizable injury to the plaintiff must exist, which causes harm or detriment to him which the court believes can be rectified in some way with financial compensation.

Whether a tort action is founded in battery or negligence, the ability to recover damages requires a "causal connection" between the defendant's conduct and the injury suffered by the plaintiff.[53] To establish this causal

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that the administration of treatment without consent and without legal justification is a battery). *See also* Anderson v. St. Francis-St. George, No. C-930819 1995 WL 109128 at *5. "If . . . the fact finders determine that negligence or battery occurred . . . the estate may legally recovery damages caused by the unwanted resuscitative efforts and the express violation [of the right to refuse treatment]." *Id.*

47. A suit in battery requires an intent to bring about a harmful or offensive contact. When a patient or a surrogate has notified a physician that he does not want a particular treatment, subsequent rendition of that treatment to that patient is offensive. 2 MEISEL, *supra* note 13, at 354 (1995).

48. Anderson v. St. Francis-St. George Hosp., 614 N.E.2d 841 (holding that damages could be recovered if a hospital and its employees failed to use reasonable care in making certain that written orders regarding a patient's treatment were followed).

49. *Anderson II*, 1995 WL 109128 at *5. "If the jury determines that adverse consequences to [a patient] occurred in a natural and continuous sequence following the unwanted resuscitative effort, then . . . [the] estate may recover all damages related thereto." *Id.*

50. 2 MEISEL *supra* note 13, at 435 (citing RESTATEMENT (SECOND) OF TORTS § 910 (1979)).

51. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 7(1), 7(2), 12(A)).

52. *Id.*

53. Oddi, *supra* note 7, at 637.

connection, the tortfeasor's actions must be both the "causation in fact"[54] and the "legal" or "proximate"[55] cause of the patient's injury.

Applied to a claim for the infringement of the right to refuse medical treatment, an award of damages requires that the medical professional's conduct: 1) was at least a "substantial factor" in bringing about a patient's injury, thereby satisfying the causation in fact, and 2) was the proximate cause of that injury and subsequent harm.

A frequently cited case for the availability of traditional tort remedies in right to die situations is *Estate of Leach v. Shapiro*.[56] Decided in the Court of Appeals of Ohio, Summit County,[57] *Leach* allowed recovery of

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54. W. PAGE KEATON ET. AL., *supra* note 37, at 263. Causation in fact involves a "but for" or "*sine qua non*" test which holds that "the defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely the defendant's conduct is not a cause of the event if the event would have occurred without it." *Id.* at 266. However, once events are set in motion by a defendant's conduct, there is virtually no limit in terms of causation, as to what he can be held to have caused in fact. *Id.* Courts therefore, generally require that a defendant's misconduct must represent a "dominant cause" or at least a "substantial factor" in the causation of the plaintiff's injury to be deemed causation in fact. *Id.* "If a defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result." *Id.* at 268.

55. *Id.* at 272-73. A sufficient causal connection is not established with only a showing of causation in fact. *Id.* An inquiry remains as to whether the defendant should be held legally responsible for the plaintiff's injury. *Id.* at 273. That question is answered by determining whether the defendant's conduct was the "proximate" cause of the injury. *Id.* Proximate cause is a legal creation formulated to limit the liability of a defendant even where causation in fact is clearly established. *Id.* Instead of a factual inquiry, proximate cause involves a determination of what consequences courts are, as a matter of policy, prepared to attribute to the conduct of the defendant. *Id.*

> As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundaries must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

Id. at 264. Courts have advanced several different theories to draw the boundaries sought under proximate cause. *Id.* at 273. The proximate cause formulation that has been adopted by at least one court ruling on a claim for damages resulting from unwanted medical treatment includes at least three factors. *See Anderson I*, 614 N.E.2d 841, 845; *Anderson II*, No. C-9308191995 WL 109128 at *5. In two separate decisions involving the same case, this appellate court held that the factors used to determine whether an injury was proximately caused included whether the injury 1) was reasonably foreseeable, 2) occured in a natural and unbroken sequence, and 3) was not superseded by any intervening cause. *Anderson I*, 614 N.E.2d at 845; *Anderson II*, 1995 WL 109128 at *5; *see also* KEATON ET. AL., *supra* note 37, at 272-321 (discussing the numerous factors and interpretations that have influenced the common law understanding of proximate cause).

56. *Leach*, 469 N.E.2d 1047 (Ohio Ct. App. 1984).

57. The Ohio appellate court deciding *Leach* was not the same court that decided the *Anderson* case discussed below.

damages in a case brought by the family of a woman who claimed she had been maintained on life support systems against her express wishes.[58]

In its decision, the court stated that "[a] physician who treats a patient without consent commits a battery, even though the procedure is harmless or beneficial,"[59] and that a cause of action exists for wrongfully placing and maintaining a patient on life-support systems contrary to the express wishes of the patient and her family.[60] Further, the court concluded that the plaintiffs might be justified in recovering all extraordinary and unnecessary medical expenses resulting from the non-consensual treatment, as well as for the pain and suffering of the patient.[61]

Unfortunately for patients seeking recovery for the wrongful administration of lifesaving medical treatment, *Leach* is one of the only cases that has recognized damages in tort for infringement on the right to die.[62] Apparently courts are wary of recognizing any damages which they view as inextricably linked with the injury of prolonged life.[63] Guided by this hesitance, courts presented with right to die suits have refused to draw a line of causation between infringement on the right to die and damages resulting from undesired treatment.[64] Furthermore, the courts' reluctance also is based upon the theory that, because patients are generally so vulnerable and close to death at that point, it is difficult to say that the injury complained of would not have occurred without the unwanted medical treatment.[65] In other words, that the unwanted medical treatment was a causation in fact of the plaintiff's injuries.

Consequently, though the traditional suits of battery and negligence remain available to right to die plaintiffs in theory, the limited case law on this issue suggests that the reality is quite different. The *Anderson* case demonstrates the tremendous difficulty plaintiffs face in recovering dam-

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58. *Id.*

59. *Id.* at 1051.

60. *Id.* at 1052. The court held that a patient or his estate may recover damages which foreseeably flow from the institution of life support treatment against the patient's wishes.

61. *Id.* at 1055.

62. Other cases include: *Anderson v. St. Francis-St. George Hosp.*, 1995 WL 109128 (Ohio Ct. App 1995); *Anderson v. St. Francis-St. George Hosp.*, 614 N.E.2d 841 (Ohio Ct. App. 1992); *Bartling v. Gendale Adventist Medical Ctr.*, 229 Cal. Rptr. 360 (Cal. Ct. App. 1986)(affirming the potential cause of action in battery for improper maintenance of life support).

63. *See* discussion of Anderson v. St. Francis-St. George Hosp., 671 N.E.2d 225 (Ohio 1996) *infra* notes 66-71.

64. *Id.*

65. *Anderson*, 671 N.E.2d at 228-29. *See also* 2 MEISEL *supra* note 13, at 436-37 (discussing the difficulties with recognizing pain and suffering damages for right to die cases).

ages for infringement on their right to refuse lifesaving medical treatment, regardless of whether they bring suit based upon wrongful living or traditional battery and negligence tort claims.

IV. *ANDERSON V. ST. FRANCIS—ST. GEORGE HOSPITAL*

On October 10, 1996, the Supreme Court of Ohio decided a suit initiated by Edward H. Winter for the infringement of his right to refuse lifesaving medical treatment.[66] He sought damages for a paralyzing stroke he suffered shortly after receiving unwanted lifesaving resuscitation.[67] Mr. Winter argued that he had been wrongfully resuscitated by hospital personnel in violation of his express wishes to refuse any lifesaving treatment.[68]

In its decision, the court denied Mr. Winter's estate[69] any recovery stemming from the damages he incurred from the hospital's infringement on his constitutional right to refuse lifesaving medical treatment.[70] This holding reversed two prior appellate court decisions, that held it possible for Mr. Winter's estate to recover all damages proximately caused by the unwanted resuscitation.[71] As the most recent state court decision to contemplate recovery in a suit claiming a violation of the right to refuse medical treatment, *Anderson* presents the current state of this issue and the legal rationale both for and against the award of damages resulting from infringement of a right expressly recognized by the United States Supreme Court.[72]

A. Facts and Procedural History

On May 25, 1988, having already suffered two heart attacks and diagnosed with chronic heart disease, eighty-two-year-old Edward H. Winter was admitted into St. Francis—St. George Hospital suffering from cardiac insufficiency.[73] In a conversation with his doctor, Mr. Winter indicated that he wanted no extraordinary lifesaving measures taken in the event of

66. Anderson v. St. Francis-St. George Hosp., 671 N.E.2d 225 (Ohio 1996).

67. *Id.* Mr. Winter died in 1990 and Keith W. Anderson, the Administrator of his estate, amended the complaint to substitute himself as plaintiff. *Id.* at 226.

68. *Id.*

69. Mr. Winter died soon after bringing this suit.

70. *Anderson*, 671 N.E.2d at 226.

71. *Id.*

72. Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261 (1990).

73. Anderson v. St. Francis-St. George, No. C-930819 1995 WL 109128 at *1 (Ohio Ct. App. 1995).

further illness.[74] The doctor entered a "no code blue" order on Mr. Winter's medical chart, indicating that Mr. Winter had exercised his right to refuse emergency medical treatment.[75] Three days later, when Mr. Winter experienced an episode of an irregular heart rhythm, a condition that can be quickly fatal, a nurse apparently unaware of the "no code blue order," resuscitated him by means of defibrillation.[76] Two days later, Mr. Winter suffered a stroke which left him partially paralyzed on his right side for the remaining two years of his life.[77] He died in 1990, following nearly two years of extensive pain, suffering and medical expenses.[78]

Mr. Winter's estate brought suit against the hospital for the pain, suffering, and medical expenses he incurred as a result of the violation of his express right to refuse lifesaving treatment.[79] Winter's estate based its claim upon two alternate theories of liability resulting from the hospital's administration of lifesaving medical treatment despite Mr. Winter's express wishes to the contrary.[80] One claim advanced the theory that Mr. Winter had suffered a wrongful living, claiming prolonged life as an injury deserving damages, as a result of the unwanted treatment.[81] The alternative claim sought damages under the traditional tort claims of battery and negligence arising out of medical treatment to which Mr. Winter did not consent.[82]

The trial court held that Winter's wrongful living claim was not cognizable under Ohio law, but did not rule on the estate's other claims based on traditional tort principles of battery or negligence.[83] On the case's first appeal (*Anderson I*), a state court of appeals[84] upheld the dismissal of the wrongful living claim, but remanded the case for an examination of the claims based in battery and negligence. The reason for the remand was for a determination as to whether defibrillation was included within the scope of the "no code blue" order, and if it was, to determine what damages, separate from those claimed for wrongful living, were proximately caused by the defibrillation.[85] Upon remand, however, the trial

74. *Id.* at *2.
75. *Id.*
76. *Id.* Defibrillation involves an electronic shocking of the heart.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Anderson v. St. Francis-St. George Hosp., 614 N.E.2d 841 (Ohio Ct. App. 1992).
85. *Id.*

court again granted summary judgment to the hospital on all damage claims.[86]

A second appeal (*Anderson II*) followed and the same court of appeals reversed, stating that the estate could recover all damages found to be proximately caused under either battery or negligence. When the case reached the Ohio Supreme Court by means of a discretionary appeal, the court reversed both appellate decisions holding that no damages were available for the hospital's infringement on Mr. Winter's right to die.[87]

B. Appellate Court Conclusions Regarding Recovery for Unwanted Resuscitation

In both appellate decisions, the court confirmed that no cause of action existed in Ohio for wrongful living resulting from unwanted medical treatment.[88] That is, one cannot recover general damages "just for finding himself still alive after unwanted resuscitative measures."[89] Both decisions, however, did recognize the plaintiff's right to bring an action in battery or negligence for the infringement on his right to refuse medical treatment.[90]

The court framed the issue in terms of "what compensable damages arise from the violation of a competent adult patient's right to refuse treatment."[91] Resting its decisions on the fundamental tort principles of causation and damages, the court held in both decisions that, if on remand the finders of fact determined that negligence or battery had occurred, the estate could legally recover all damages proximately caused by Mr. Winter's unwanted resuscitation.[92] Since Mr. Winter's estate was prepared to offer testimony that it was medically foreseeable for Mr. Winter to suffer a stroke in the days following resuscitation, the Court of Appeals remanded the issue for a jury to decide.[93] The court's remand on the second appeal carried instructions that if the jury determined that Mr. Winter's adverse health consequences occurred in a natural, continuous and unbroken sequence following defibrillation, then the estate could recover all related damages. Related damages included: all medical ex-

86. *Anderson II*, C-930819 1995 WL 109128 at *1.
87. *Anderson*, 671 N.E.2d 225 (Ohio 1996)
88. *Anderson I*, 614 N.E.2d at 845; *Anderson II*, C-930819 1995 WL 109128 at *3.
89. *Anderson II*, C-930819 1995 WL 109128 at *3.
90. *Anderson I*, 614 N.E.2d at 844-45; *Anderson II*, C-930819 1995 WL 109128 at *5.
91. *Anderson II*, C-930819 1995 WL 109128 at *3.
92. *Anderson I*, 614 N.E.2d at 845; *Anderson II*, C-930819 1995 WL 109128 at *5.
93. *Anderson*, 1995 WL 109128 at *5.

penses after resuscitation; the costs of living in a nursing home; any extraordinary costs related to care; as well as for pain, suffering and emotional distress related to the stroke.[94]

C. Supreme Court Conclusions Regarding Recovery for Unwanted Resuscitation

Like the appellate court, the Ohio Supreme court confirmed the nonexistence, in Ohio, of a wrongful living cause of action.[95] Unlike the appellate court however, the supreme court refused to allow recovery for the reasonably foreseeable damages resulting from Mr. Winter's unwanted resuscitation.[96] The court stated that, in reality, the court of appeals had recognized a cause of action fundamentally identical to an action for wrongful living.[97] To support this conclusion, the court pointed to the lack of any evidence that the defibrillation by itself caused or contributed to Mr. Winter's stroke and subsequent suffering in any way other than simply prolonging his ailing life.[98]

The court refused to draw the line of causation between the defibrillation and Mr. Winter's subsequent stroke, concluding that "an act is not regarded as a cause of an event if the particular event would have occurred without the doing of the act . . ." and that there was no evidence that the stroke would not have occurred without defibrillation.[99] The court believed that when an ailing, eighty-two-year-old man's life is prolonged, numerous injuries and ailments could forseeably follow resuscitation without having been *caused* by the defibrillation.[100] Rather, the only injury *caused* by the defibrillation was the prolonging of Mr. Winter's life.[101] To grant recovery for life, that is, the injury of continued living, simply was unacceptable to the court.[102]

In refusing to recognize that the stroke and subsequent damages were caused by the unwanted defibrillation, the court held that the only damages available to the estate were those suffered directly from the un-

94. *Id.*
95. *Anderson*, 671 N.E.2d at 228.
96. *Id.* at 228-29.
97. *Id.* at 228. "The court of appeals' theory of recovery seems to be identical to the theory of recovery underlying a claim of 'wrongful living.'" *Id.*
98. *Id.*
99. *Id.* at 228.
100. *Id.* at 228-29
101. *Id.*
102. *Id.*

wanted touching.[103] Since the actual touch was in itself physically harmless, (outside of its life saving correction of Mr. Winter's heart's rhythm) no damages were granted Mr. Winter's estate.[104] The court observed, however, that "unwanted life-saving treatment does not go undeterred," and that appropriate licensing sanctions against the medical professionals responsible were appropriate.[105]

The legal conclusions reached by the Ohio Court of Appeals and the Supreme Court of Ohio clearly negate the existence, in Ohio, of a wrongful living cause of action. The two courts differ significantly, however, regarding the damages recoverable in tort for the infringement on the right to refuse medical treatment.

V. Analysis of Legal Conclusions in Anderson

The *Anderson* case provides an excellent example of how the ability to recover damages for the infringement on the right to die has been severely limited by the legal dilemma inherent in recognizing life as a compensable harm. An evaluation of *Anderson* is particularly helpful in understanding the current state of the law for right to die plaintiffs for a couple of reasons. First, it is the most recent case to contemplate potential recovery for an infringement on the right to die. Second, it is the only state supreme court decision to rule directly on the availability of damages for unwanted lifesaving treatment since *Cruzan.* An analysis of the divergent decisions authored by the appellate and supreme courts in this Ohio case not only demonstrates the prevailing judicial approach to recovery for unwanted medical treatment, but also provides a greater understanding of the legal impediments affecting right to die litigation. Importantly, the decision clearly exemplifies the contradiction between the existence of a constitutionally protected right and no significant legal redress for a violation of that right.

1. Wrongful Living

While the court of appeals and the supreme court accept in *Anderson* that a patient has a right to refuse medical treatment as established in *Cruzan*,[106] both expressly enunciate that no cause of action exists for

103. *Id.* at 229.
104. *Id.*
105. *Id.*
106. *Anderson*, 671 N.E.2d at 227. "Because a person has a right to die, a medical professional who has been trained to preserve life . . . is required by a legal duty to accede to a patient's express refusal of medical treatment." *Id.*

wrongful living in the state of Ohio.[107] Consistent with all jurisdictions that have ruled on this matter, both courts refused to recognize life as a cognizable injury.[108] Both the appellate and supreme court concurred in the principle that an individual cannot recover general damages just for finding himself alive after unwanted resuscitative measures.[109]

2. Battery or Negligence

The appellate and supreme court differred significantly as to what damages may theoretically be recovered in a tort action based in negligence or battery for the infringement on the right to refuse lifesaving medical treatment. The court of appeals supports the potential award of damages by holding that a plaintiff may recover "all damages related thereto,"[110] including medical expenses, extraordinary expenses related to care, pain, suffering and emotional distress,[111] provided a sufficient causal connection exists between an unwanted resuscitation and the adverse consequences which follow. Reversing this interpretation, the Ohio Supreme Court denied potential damages, holding that where the record clearly indicated that Mr. Winter would have died without the lifesaving defibrillation, damages claimed in connection with a subsequent stroke were inextricably linked to a cause of action for prolonging life, and therefore not recoverable.[112]

Central to these inapposite findings regarding the damages available to a right to die plaintiff is the respective willingness of each court to find that any damages other than a prolonged life resulted from the unwanted resuscitation. Specifically, the focus with respect to the question of damages was what injury, if any, could have been proximately caused by the unwanted defibrillation separate and distinct from the injury of prolonged life. The answer to this question is dependent upon the manner in which each court approaches the causal connection between the un-

107. *See Anderson*, 671 N.E.2d at 228; *Anderson II*, C-930819 1995 WL 109128 at *2; *Anderson I*, 614 N.E.2d at 846.

108. *Anderson I*, 614 N.E.2d at 846. "Damages . . . are not those things that add to life, but those that subtract from it." *Id.* For a discussion of cases refusing to recognize life as a cognizable injury *see supra* note 10.

109. *See Anderson*, 671 N.E.2d at 228; *Anderson II*, C-930819 1995 WL 109128 at *2; *Anderson I*, 614 N.E.2d at 846.

110. *Anderson II*, C-930819 1995 WL 109128 at *5.

111. *Id.*

112. *Anderson*, 671 N.E.2d at 228 (holding that the only reason Winter was able to suffer the stroke was because his life was prolonged by defibrillation).

wanted resuscitation and Mr. Winter's stroke and subsequent suffering and/or expenses.

The court of appeals held, in both decisions, that the plaintiff can recover all damages proximately caused by the unwanted defibrillation.[113] In *Anderson II*, the court stated that "[i]f an injury occurs in a natural, continuous and unbroken sequence, it is reasonably foreseeable, and the tortfeasor is responsible for it."[114] While still requiring a finding of causation between the intentionally or negligently administered treatment and the patient's damages, this holding offers a more expansive interpretation of what damages may be attributable to a breach of the right to refuse medical treatment. It does not limit the reasonably foreseeable result of the defibrillation to the prolonging of Mr. Winter's life.[115]

Unfortunately for right to die plaintiffs, this expansive approach was rejected by the Ohio Supreme Court. Its restrictive interpretation of those damages caused by the adminstration of lifesaving medical treatment provides the ultimate legal standard in Ohio. It found the court of appeals' recognition of potential damages "to be identical to the theory of recovery underlying a claim of 'wrongful living.'"[116] That is, because the court finds the only injury possibly "caused" by the defibrillation to be the continuation of Mr. Winter's life, any suit brought to recover for the unwanted lifesaving treatment necessarily implicates a finding of life to be a cognizable injury.[117] Therefore, like a wrongful living suit, the plaintiff's battery and negligence claims necessarily implicate the impossible valuation of being versus non-being.[118]

By equating a cause of action seeking the foreseeable damages proximately caused by unwanted medical treatment with a cause of action for wrongful living, the court effectively eliminates recovery for the right to refuse medical treatment in Ohio. Its limited line of causation prevents Mr. Winter from recovering general damages for pain and suffering associated with his stroke and restricts his potential damages to those suffered directly from the battery or negligent conduct resulting from unwanted medical treatment.[119] Given this strict construction, these damages would be limited to nominal damages because the defibrillation in itself

113. *Anderson I*, 614 N.E.2d at 845; *Anderson II*, C-930819 1995 WL 109128 at *5.
114. *Anderson II*, C-930819 1995 WL 109128 at *5.
115. *Id.*
116. *Anderson*, 671 N.E.2d at 228.
117. *Id.*
118. *Id.*
119. *Id.* at 229. "The only damages . . . [plaintiff] may recover are those damages suffered . . . due directly to the battery." *Id.*

was physically harmless.[120]

An examination of the *Anderson* decisions in light of the traditional tort principles of causation reinforces the idea that divergent approaches to the causation issue played a significant role in each court's position on the damages recoverable from an unwanted lifesaving resuscitation. The Ohio Supreme Court's analysis of the potential causal connection between the defibrillation, Mr. Winter's stroke and his subsequent damages is based entirely on an examination of "causation in fact." Reciting the "but for" or "*sine qua non*" test for causation, the court finds that an act is "not regarded as a cause of an event if the particular event would have occurred without the doing of the act."[121] Following this fundamental principle, the court concludes that the unwanted resuscitation did not even amount to a "substantial factor" in the damages suffered by Mr. Winters. The court holds that "Winter suffered the stroke because the nurse enabled him to survive"[122] and "[b]ecause the nurse prolonged Winter's life, numerous injuries occurring after resuscitation might be foreseeable, but would not be *caused* by the defibrillation."[123]

The court of appeals, on the other hand, approached the causation dilemma by focusing on the "proximate" or "legal cause" of Mr. Winter's damages.[124] Although the court rejected wrongful living as a compensable harm, the fact that it remanded the case for a determination of proximately caused harms resulting from the defibrillation indicates that from its persepective, the unwanted resuscitation was at least a cause in fact of Mr. Winter's injuries.[125] Conceding that the defibrillation might have been a cause in fact, it left for a jury to determine the extent to which the defibrillation proximately caused Mr. Winter's subsequent damages.[126] Consequently, the hospital could be responsible for Mr. Winter's stroke and related damages if a jury determined that subsequent injury: 1) was a

120. *Id.* at 229. "Where the battery was physically harmless, however, the plaintiff is entitled to nominal damages only." *Id. But see Anderson I*, 614 N.E.2d at 847. Nominal damages are not available for a negligent touching.

121. *Anderson*, 671 N.E.2d at 228.

122. *Id.*

123. *Id.* (emphasis added)

124. *Anderson I*, 614 N.E.2d at 845; *Anderson II*, C-930819 1995 WL 109128 at *5.

125. *Id.* The court appears to acknowledge that the defibrillation was a substantial factor in bringing about Mr. Winter's injuries. *See supra* note 54 discussing causation in fact.

126. *Anderson II*, C-930819 1995 WL 109128 at *5. "If the jury determines that the adverse consequences to Winter's health occurred in a natural and continuous sequence following the unwanted resucitative effort, then Winter's estate may recover all damages related thereto. . . ." *Id.*

reasonably foreseeable result of the defibrillation;[127] 2) occurred in a natural and continuous sequence following;[128] and, 3) no superseding cause existed.[129]

The fact that each court focused on a different aspect of the causation element is not surprising considering how differently each approached the issue. The supreme court applied a very strict interpretation of causation, limiting the result of defibrillation to the immediate prolonging of life.[130] It refused to recognize the existence of causation in fact; therefore, a discussion of "proximate cause" was unnecessary.[131] The court of appeals, in comparison, assumed in both decisions, the presence of "causation in fact" without comment. Instead, it focused exclusively on proximate cause, namely, whether it was fair to hold a tortfeasor accountable under these circumstances, and provided the standards necessary for a jury to make such a determination.[132]

Through its restrictive holding, the Ohio Supreme Court creates a very difficult, if not impossible, barrier to recovery in tort for the infringement on an individual's right to refuse lifesaving treatment. The court of appeals decisions may have offered a glimmer of hope for plaintiffs looking to recover for the infringement on this right, but the supreme court effectively shut the door by refusing to extend liability to those damages it views as inextricably linked to the injury of prolonged life.[133] *Anderson* clearly demonstrates how the courts' general refusal to view life as a compensable harm prohibits recovery not only for suits in wrongful living, but also for right to die suits raised under tort actions of battery and negligence.

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127. *Anderson II*, C-930819 1995 WL 109128 at *5 (framing the issue as "was it reasonably foreseeable that unwanted resuscitative measures would cause adverse health consequences to [Mr. Winter]?").

128. *Anderson I*, 614 N.E.2d at 845. In *Anderson I*, the Court explained that "later harms are proximately caused by the wrongful act if . . . they are part of a natural and unbroken sequence resulting from the act." *Id.* (citation ommitted). Likewise, in *Anderson II*, the court held that the later injury was proximately caused if the resulting stroke was reasonably foreseeable, defining reasonably foreseeable to mean the injury occurred in a natural, continuous and unbroken sequence. *Anderson II*, No C-930819 1995 WL 109128, at *5.

129. *Anderson I*, 614 N.E.2d at 845.

130. *Anderson*, 671 N.E.2d at 229. Holding that the defibrillation itself did not contribute to the stroke in any other way than "simply prolonging his life." *Id.*

131. *See supra* notes 54-55 (discussing the two elements of proximate cause).

132. *Anderson I*, 614 N.E.2d at 845; *Anderson II*, No. C-930189 1995 WL 109128 at*5.

133. *Anderson*, 671 N.E.2d at 229. The court's holding that the conceivable results of the resuscitation were limited to the prolonging of Mr. Winter's life it links any injuries which follow to the injury of life itself.

VI. ALTERNATIVE FORMS OF RELIEF FOR RIGHT TO DIE PLAINTIFFS

A. Special Damages As An Alternative to General Damages: The Wrongful Life Approach to Damages

A possible solution to mitigate the courts' reluctance or inability to award general damages[134] for the violation of the right to refuse medical treatment would be to allow only special damages[135] for the medical expenses and extraordinary costs incident to the plaintiff's continued living.[136] The maintenance of an individual's life through life supports can be extremely expensive.[137] Likewise, the medical expenses and extraordinary care (nursing home, special care etc.) required by an individual following an unwanted resuscitation can be staggering.[138] Granting relief for infringing on one's right to die by awarding special damages would lend some practical significance to the right to refuse medical treatment by allowing the patient or his estate to recover those costs which would not have been incurred but for the violation. At the same

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134. BLACK'S LAW DICTIONARY 371 (6th ed. 1990). Defining general damages:

> such as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct, and proximate result, or such as necessarily result from the injury, or such as did in fact result from the wrong, directly and proximately, and without reference to the special character, condition, or circumstances of the plaintiff.

Id. (citations ommitted)

135. *Id.* at 392. Defining special damages:

> Those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. Such are damages which do not arise from the wrongful act itself, but depend on circumstances peculiar to the infliction of each respective injury.

Id.

136. Knapp & Hamilton, *supra* note 7, at 269.

137. Robert Dzielak, *Physicians Lose the Tug of War to Pull the Plug: The Debate About Continued Futile Medical Care*, 28 J. MARSHALL L. REV. 733, 767 n.214 (1995). Life support equipment for a single patient may easily amount to $2000 per day. *See also* David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B.C. L. REV. 443, 460 (1997). When the Supreme Court was deciding whether to permit the withdrawal of Nancy Cruzan's feeding tube, the costs of her care were reported to be more than $130,000 per year.

138. Harris Meyer, *Egging People On*, HOSPITALS 1996, October 20, 1996, at 36. Nursing home care costs for an individual are $40,000 a year on average, and can rapidly wipe out most people's life savings. Almost seventy percent of all nursing home residents end up having their care at least partially funded by Medicaid, many after exhausting their own funds. *See also* Paul J. Zwier, *Looking for a Non-legal Process: Physician-Assisted Suicide and the Care Perspective*, 30 U. RICH. L. REV. 199, 202 n.22 (1996). Some estimates of long term nursing care run as high as $100,000 for the average person. The average stay of nineteen months runs from $30,000 to $60,000 annually.

time, granting special damages would not require courts to recognize the prolongation of life as a cognizable injury deserving of general damages.[139] That is, by utilizing this approach, courts could side step the intractable dilemma of measuring the value of life versus the value of non-life.

Like wrongful living, wrongful life is a tort claim which forces courts to consider life as a compensable harm. A wrongful life claim is a suit brought against a doctor by or on behalf of a child who has been born with a disease or other disorder and alleges that he or she would not have been born had the physician not negligently failed to inform his or her parents that the particular defect might occur.[140] While some of the substantive elements of wrongful life suits differ from those in a claim for unwanted resuscitation or administration of life-supports, both claims involve theories of recovery deeply rooted in the concept of "life" as a cognizable injury.[141]

While only three states currently recognize the right of a child to bring a wrongful life claim,[142] the manner in which courts in these jurisdictions have approached the issue of damages for such claims could prove very helpful in formulating and awarding damages for the infringement on the right to die. As a means of granting some relief to plaintiffs in wrongful life actions without expressly acknowledging the child's life as an injury, these courts have turned to awarding special damages for the extraordinary medical care and related expenses suffered by the child and his or her family.[143] An excellent example of this special damages approach is found in *Procanik v. Cillo*,[144] a New Jersey Supreme Court case upholding a child's claim for wrongful life stemming from a physician's negligent failure to diagnose measles during the first trimester of pregnancy.[145] While the *Procanik* court refused to recognize general damages, declaring that "there is no rational way to measure non-existence or to compare non-existence with the pain and suffering of . . . impaired existence. . . .,"

139. Procanik v. Cillo, 478 A.2d 755, 763 (N.J 1984).

140. Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT'L & COMP. L.J. 535, 536 (1995).

141. Knapp & Hamilton, *supra* note 7, at 258. "Valuation of life exists as legal problem in . . . [both] situations."

142. Jackson, *supra* note 140, at 540. (footnote omitted) New Jersey, California and Washington have recognized wrongful life. *See e.g.* Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983); Procanik v. Cillo, 478 A.2d 755 (N.J 1984); Turpin v. Sortini, 643 P.2d 954 (Cal. 1982).

143. *See Procanik*, 478 A.2d at 762; *Turpin*, 643 P.2d 954 at 965.

144. *Procanik*, 478 A.2d 755 (N.J. 1984).

145. *Id.*

it did grant special damages for the medical expenses and extraordinary costs associated with the child's impairment.[146] In doing so, the court found that "the interests of fairness and justice are better served through more predictably measured damages – the costs of the extraordinary medical expenses necessitated by the infant plaintiff's handicaps."[147] Limiting recovery to special damages, the *Procanik* court was able to award monetary damages for costs incurred by the child and his family without having to undertake the implicit recognition of life as a compensable injury otherwise required in a finding for general damages for a child's pain and suffering.

The special damages approach presents a means to effectuate the right to refuse lifesaving medical treatment. Damages awarded for medical expenses and extraordinary costs associated with an unwanted resuscitation or unwanted administration of life support would provide important relief for patients and families forced to incur the thousands of dollars necessary to cover medical bills, nursing homes, and special care requirements.[148] Given that such extraordinary costs would not have occurred, but for the failure to honor a patient's wishes to exercise his or her constitutional right to refuse treatment, it only seems fair that the patient or his family be compensated for these expenses. Importantly, special damages would not mandate a factfinder to evaluate "being v. non-being."[149] Instead, all that need be calculated is the cost of medical expenses or extraordinary care commencing at the time of the wrongful resuscitation or administration of life support systems and ending at the time of the patient's death.[150]

A closer look reveals that special damages are well suited in a claim for the infringement of the right to refuse medical treatment.[151] The calculations for the medical and extraordinary expenses associated with a prolonged life can be made with even more precision than those involved in a claim for a wrongful life.[152] Assessing special damages in a wrongful life claim involves a highly speculative assessment of the expenses to be

146. *Id.* at 762-63.

147. *Id.* at 763.

148. *See supra* notes 137-38.

149. Knapp & Hamilton, *supra* note 7, at 269. Asserting that the award of special damages for medical expenses in wrongful life cases "should be extended to wrongful living cases, since such damages do not require an assessment by the fact finder of the relative value of 'being versus non-being.'" *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

incurred over the lifetime of a child.[153] In comparison, in a claim for an unwanted resuscitation or administration of life support, special damages can be calculated within a very precise time frame beginning with the commencement of undesired treatment and ending with the patient's death.[154]

B. Non-Payment For Unwanted Medical Treatment

Given the immense difficulties plaintiffs face in recovering for the tortious infringement on a patient's right to refuse lifesaving treatment, another alternative for right to die plaintiffs may be refusing to pay health care providers for unwanted medical treatments. Utilizing fundamental contract principles, some commentators have argued that patients or their families should not be forced to pay for unwanted or unconsented to treatments.[155]

Following basic contract and consumer law principles, this non-payment argument provides that "medical services should be considered as would any other economic commodity — to be paid for only when voluntarily, knowingly, and competently purchased."[156] Any health care provider/patient relationship is in reality a bilateral contract to perform services in which mutual promises are exchanged between the parties. This relationship is supported by consideration; provider promises to give medical care and patient promises to pay.[157] However, where the patient or his or her proxy does not consent to a particular medical intervention, no contract exists for that treatment. Neither they, nor a third party payer who is obligated to act for the patient's benefit, should have any duty to render payment for those services.[158]

In addition to alleviating the burden of paying for unwanted medical services, non-payment could promote greater respect among health care providers for a patient's right to refuse lifesaving medical treatment. The financial loss incident to non-payment for lifesaving treatment would force physicians and health care facility administrators to follow more conscientiously the treatment preferences and values expressed by or on

153. *Id.*

154. *Id.* "Wrongful living suits necessarily involve assessment of damages for a period commencing at the time of the wrongful resuscitation or institution of life-sustaining therapy and ending at the time of the patient's death." *Id.*

155. Marshall B. Kapp, *Enforcing Patient Preferences: Linking Payment for Medial Care to Informed Consent*, 261 JAMA 1935, 1936 (1989).

156. *Id.*

157. *Id.*

158. *Id.*

behalf of patients.[159] Under such a system, health care providers would either respect the patient's wishes or provide treatment that will never be compensated.[160]

Utilizing the law of contracts to require health care institutions to meet the significant costs associated with administering life saving treatments against a patient's express wishes would not replace the general damages a plaintiff seeks in a tort suit for an infringement on the right to die. It would, however, require health care institutions heed the wishes of an individual regarding the right to refuse treatment. As added support, non-payment also can provide substantial relief to those plaintiffs who suffer financial detriment when third party providers no longer cover the costs of an artificially prolonged life.

VII. Plaintiffs' Inability to Recover for the Infringement on the Right to Die

The right to refuse lifesaving medical treatment as recognized in *Cruzan* may prove to be a right in name only. While the Supreme Court and federal and state legislatures have taken steps to recognize and effectuate the right to die, the courts of this country have generally refused to hold that an infringement upon this right precipitates a compensable harm.[161] The reluctance to recognize damages in actions asserting a violation of the right to die has been guided by a categorical refusal to recognize *life* as a cognizable injury deserving monetary damages.[162] As stated by the Ohio Supreme Court in *Anderson*, assessing damages for life "demonstrates the outer bounds of liability in the American civil justice system. . . ."[163]

To date, no court in any American jurisdiciton has recognized a claim for wrongful living: a suit that asserts a patient's life was wrongfully prolonged as a result of unwanted medical treatment.[164] The problem with this novel cause of action is that the alleged harm is life itself. Given the general aversion to valuing being versus non-being, it is unlikely that

159. *See* Gasner, *supra* note 6, at 513-20.

160. *Id.* "Withholding reimbursement means that the provider must either honor the patient's wishes or render treatment that ultimately may not be compensated." *Id.*

161. *See id.* at 499.

162. *See supra* text accompanying note 10.

163. *Anderson*, 671 N.E.2d at 228.

164. *See* Anderson v. St. Francis-St. George Hosp., 671 N.E.2d 225 (Ohio 1996); Benoy v. Simon, 831 P.2d 167, 170 (Wash. Ct. App. 1992)(denying a cause of action for wrongful prolongation of life).

right to die plaintiffs will ever succeed under the wrongful living cause of action.

It has been argued, however, that plaintiffs are not prohibited from recovering for an infringement on the right to die under traditional tort principles.[165] Indeed, two Ohio state appellate courts have held that plaintiffs may recover general damages caused by an unlawful infringement on their right to refuse lifesaving medical treatment.[166] Unfortunately for plaintiffs who look to these decisions for support in seeking relief for the harm suffered incident to an infringement on a their right to die, the Supreme Court of Ohio significantly limited the potential relief advocated by these courts.[167]

The final decision in *Anderson* effectively prohibits the recovery of general damages in tort for the infringement on the right to refuse lifesaving medical treatment.[168] In its decision, the court refuses to recognize that any damages can be proximately caused by an unwanted resuscitation other than the injury of prolonged life.[169] If the court's conclusions are followed, any suit brought to rectify an infringement on the right to refuse treatment, whether it be a resuscitation or the administration of life supports, would be analogous to the forbidden suit of wrongful living because the only "harm" caused would be life.

VIII. Conclusion

The principle that life, in itself, cannot be a compensable harm is consistent with our society's general respect for and protection of individual life. However, unless courts are willing to broaden the limited approach to causation advocated by the Ohio Supreme Court and find that compensable damages can exist seperate and distinct from a prolonged life, no recovery in tort will exist for violation of the right to refuse lifesaving treatment.

To mitigate the potentially devastating precedent *Anderson* sets for the ability of a plaintiff to recovery under traditional tort principles, this Comment suggests two alternatives that can provide financial relief for patients and their families and simultaneously foster greater respect for

165. *See supra* note 11.

166. *See* Anderson v. St. Francis-St. George, 614 N.E.2d 841 (Ohio Ct. App. 1992), *appeal after remand*, C-930819 1995 WL 109128 (Ohio Ct. App. Mar. 15, 1995); Estate of Leach v. Shapiro, 469 N.E.2d 1047 (Ohio Ct. App. 1984).

167. *See Anderson*, 671 N.E.2d at 225.

168. *Id.*

169. *Id.* at 228-29.

an individual's right to refuse lifesaving treatment. First, awarding special damages for the medical expenses and extraordinary costs associated with a prolonged life appears to represent an appropriate means of compensation which can rectify the financial loss plaintiffs would not have suffered but for the unwanted treatment.[170] Second, non-payment for unconsented to treatment would not only relieve plaintiffs of the financial burden of paying for unwanted treatment, but also force healthcare providers to be more cognizant of an individual's right to refuse treatment.[171] These approaches are particularly attractive to right to die plaintiffs because they do not require courts to conduct an analysis of whether life is a compensable harm. Unfortunately, these two approaches, which present plaintiffs with viable relief alternatives for an infringement on the right to refuse treatment, have not gained recognition by American courts.

As a result, right to die plaintiffs continue to face significant challenges in convincing the American legal community to allow recovery for the damages suffered by a patient following the unwanted administration of lifesaving treatment. The widely shared belief that the prolongation of life is not a compensable harm will continue to constrain courts in recognizing any significant remedy for the infringment on the right to die. Barring a dramatic shift in judicial sentiment, the right to refuse lifesaving medical treatment, as established in *Cruzan*, will remain a right in name only without any significant remedy at law.

John Donohue

170. Knapp & Hamilton, *supra* note 7, at 269.
171. *See* Kapp, *supra* note 155, at 1936.